575-576, 583-584.) In 1946 he deducted a loss of $533.88 which he had taken in 1945 (R. 574).

ARGUMENT

1. Petitioner urges that proof of the wilful filing of a false and fraudulent income tax return cannot, without more, sustain his conviction under Section 145(b) of the Internal Revenue Code, *supra,* pp. 2-3 (Br. 27-40). He contends that, at most, such proof would support conviction under either Section 145(c), *supra,* p. 3, or Section 3616(a) *supra,* p. 3, of that Code (both lesser offenses). Petitioner's argument rests on a misconception of this Court's opinion in *Spies* v. *United States,* 317 U.S. 492. It is not only without merit but it is, in addition, the same contention as that rejected by the Third Circuit in *United States* v. *Croessant,* 178 F. 2d 96, certiorari denied, 339 U. S. 927 which decision this Court only recently refused to review, and *United States* v. *Pannell,* 178 F. 2d 98, certiorari dismissed on motion of counsel for Pannell, 339 U.S. 927.

The *Spies* case does not require that in every Section 145 (b) prosecution there be proof of concealment of income in the conduct of the taxpayer's business or financial affairs, nor does it require that in a tax evasion case the willful attempt to evade and defeat the tax be constituted by an affirmative act *other* than the knowing filing of a false and fraudulent return.

Spies was a no-return case in which the Government based its charge of willfully attempted

evasion upon the defendant's failure to file. The Court held that this omission, i. e. the non-observance of the statutory duty to make a return (defined as a misdemeanor under Section 145 (a) of the Code), could not constitute the affirmative action contemplated by the use of the term "attempt" in Section 145 (b). 317 U. S., at 499. By way of illustration only, the Court enumerated certain acts from which "affirmative willful attempt may be inferred," even in a case in which there is "default in filing the return and paying the tax" (pp. 499-500). That the list did not include the act of filing a false and fraudulent return cannot avail petitioner, since it is obvious that such an affirmative act would not be pertinent to a case involving no return at all. On the contrary, it is clear that this Court did not intend to foreclose consideration, in a case in which a return is made, of the filing of a false and fraudulent return as a means of attempted evasion. The Court not only warned (p. 499):

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner."

but it specifically announced that "affirmative willful attempt may be inferred from * * * *any*

conduct, the likely effect of which would be to mislead or to conceal" (italics supplied).

Nor is the court below in conflict with the Fifth Circuit. In *Jones* v. *United States,* 164 F. 2d 398 (C. A. 5), the conviction was reversed because the trial court, in addition to other serious errors, had apparently instructed the jury that a knowing failure to return the taxpayer's full income was sufficient, in itself, for conviction under Section 145 (b). Here, on the other hand, the trial judge expressly charged the jury that in order to find that petitioner had wilfully attempted to evade and defeat his tax, they must find that the errors made in his tax returns were wilfully made by him "with knowledge, and with the purpose to do wrong" (R. 676), that "he had a wicked intent and was knowingly cheating the Government," and that he "acted with a bad motive, intending to defeat or evade the income tax" (R. 679). Furthermore, if the *Jones* opinion ever created any doubt as to how the Court of Appeals for the Fifth Circuit had read the *Spies* decision, the Fifth Circuit has decisively negatived any conflict with the court below by its later decision in *Barrow* v. *United States,* 171 F. 2d 286, which is in square accord with the instant holding. The Eighth Circuit also appears to be in agreement. *Cave* v. *United States,* 159 F. 2d 464, 466-467, certiorari denied, 331 U. S. 847; *Myres* v. *United States,* 174 F. 2d 329, certiorari denied, 338 U. S. 849; cf. *Kirsch* v. *United States,* 174 F. 2d 595 (C. A. 8).

Identical contentions, based on substantially the same arguments, i.e., that the case of *Spies* v. *United States,* 317 U. S. 492, prohibits conviction on such proof, were rejected by the Third Circuit in *United States* v. *Croessant,* 178 F. 2d 96, certiorari denied, 339 U. S. 927, and *United States* v. *Pannell,* 178 F. 2d 98, certiorari dismissed on motion of counsel for Pannell, 339 U. S. 927. The Court is respectfully referred to our brief in opposition (Point I, pp. 7-10) in the *Croessant* case (No. 591, O.T. 1949) for our answer to the arguments made in those cases.

It may be assumed, for present purposes, that the evidence in this case would have supported convictions for the lesser offenses, dealing with false returns, established by Section 145 (c) and Section 3616 (a) of the Internal Revenue Code. It does not follow, of course, that these facts cannot also sustain a conviction under Section 145 (b), nor that prosecution must be had only under the narrower provisions. See *Taylor* v. *United States,* 179 F. 2d 640 (C.A. 9), rejecting contentions similar to those advanced here.

2. Petitioner also urges (Br. 40-47) that the wilful filing of a false and fraudulent income tax return was not an offense under Section 35(A) of the Criminal Code, *supra,* p. 4 [2], as charged in count 5 of the indictment, basing his argument on the ground that Section 35(A) of the Criminal

[2] Now codified as 18 U.S.C. 1001.

Code was impliedly repealed *pro tanto* by the enactment of Section 145(c) of the Internal Revenue Code, *supra*, p. 3. This contention is clearly without merit. As stated by the court below, even if there was a miscitation of the statute in count 5 of the indictment, petitioner's defense was not prejudiced thereby. In any event, the question does not appear to be open for consideration here.

The court below, on petitioner's contention that counts 3 and 5 alleged one and the same offense, struck the $2,000 fine from the sentence received by petitioner under count 5 (R. 901). This resulted in petitioner's receiving concurrent two-year prison sentences on counts 3 and 5 and a fine of $2,000 on count 3 only. Consequently, it is now immaterial whether the conviction under count 5 rested on Section 35(A) of the Criminal Code or on Section 145(c) of the Internal Revenue Code. Since the prison sentence imposed on petitioner on count 5 does not exceed and is concurrent with the prison sentence he received on count 3, under which he was validly convicted for violation of Section 145(b) of the Internal Revenue Code, he could not be injured by the imposition of the prison sentence on count 5. Hence, there is no necessity for considering the question raised by this contention of petitioner. *Hirabayshi* v. *United States*, ~~328 U. S. 640, 642~~ 320 U.S. 81, 85; Pinkerton v. United States, 328 U.S. 640, 642

3. Petitioner's contention that the trial judge failed to give proper instructions to the jury con-

cerning specific transactions relating to his income, is without substance. The trial judge gave full and correct instructions covering the elements of the offenses charged in the indictment (R. 672-686). As to the specific transactions giving rise to the alleged understatement of net income, the trial court properly left it to the jury to determine whether they were bona fide or fictitious. Under instructions given by the court, the jury might have determined that the transactions were either bona fide or were believed to be bona fide by the petitioner. The verdict of guilty necessarily establishes that the jury did not so believe.

The evidence adduced in this case was sufficient to sustain the verdict of guilty. The Government proved the filing of factually false returns reflecting substantial understatement of net income. From these facts and the surrounding circumstances the jury could properly infer wilfulness on the part of petitioner. *Spies* v. *United States, supra,* at pages 499-500.

CONCLUSION

The decision of the court below is plainly correct and there are no conflicts of decision. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 397.

ALFRED C. GAUNT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

ROBERT F. BRADFORD,
WILLIAM L. MCGOVERN,
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Supreme Court of the United States

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No. 397.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

I. Questions Presented . . . The United States Presents New Question.

The Petitioner submitted as the first two questions upon which his petition rested the following:

> "1. Did the court below err in treating the mere filing of an incorrect return which understated the income of a businessman, who kept full records of his income but who did not return certain items which he believed to be non-taxable, as the affirmative and overt act of concealment which this Court in *Spies* v. *United States,*

317 U. S. 492, held necessary to subject a taxpayer to liability for the felony of wilfully evading taxes defined in Section 145 (b), I.R.C., as distinguished from the misdemeanors defined in Section 145 (a) (wilful failure to pay tax) and 3616 (a) (fraudulent return with intent to evade tax).

"2. Did the court below err in affirming the conviction of petitioner for a wilful attempt to evade taxes and a wlful subscription to a return not believed to be true and correct as to every material matter, the felonies defined in Section 145 (b) and 145 (c), I.R.C., where the Circuit Court affirmed on the ground that, construing the evidence in the light most favorable to the Government, 'the jury could well have found that the defendant was an intelligent, astute, and successful business executive with many years of experience who had full records of his income available, and that the understatements in his returns for the years involved, which he made out himself, were gross.' (R. 902)"

Instead of responding to these two questions, the United States propounded a question of its own:

"1. Whether a conviction under Section 145 (b) of the Internal Revenue Code—penalizing a willful attempt in any manner to evade or defeat a tax—may be sustained where the knowing filing of a false and fraudulent return constitutes the affirmative willful attempt to evade and defeat the tax."

The Petitioner submits that the Government has not answered the question of whether the mere filing of an incorrect and false return, without more, can constitute the "willful" act of evasion required by the felony. In the question phrased by the Government, the element of knowledge is assumed and inserted. It is precisely this "knowledge" and its correlative "wilfulness" that the Petitioner not only denies can be inferred from the evidence, but also maintains could not properly be inferred by the jury because of the utter failure of the trial court to instruct the jury as to the elements distinguishing the misdemeanors defined by 145 (c) and 3616 (a) from the felony denounced by 145 (b).

The question posed by the United States derives from a patent misconstruction of *Spies* v. *United States*, 317 U. S. 492. In the *Spies* case, this Court specifically enunciated the types of conduct from which the "wilfulness" essential to the felony of tax evasion defined in Section 145 (b) might be inferred. *The Government in its Brief in Opposition to the Petition apparently concedes that the facts of this case do not measure up to the types of conduct condemned by this Court in the Spies case, supra.* As Judge Yankwich in his comprehensive opinion in *United States* v. *Cole, et al.*, 90 F. Supp. 147, decided on April 26, 1950, characterized the types of conduct denounced in the *Spies* case, *supra,*

> "In brief, when the Congress spoke of 'wilful' acts, they had in mind acts of the type which by common knowledge are done to 'conceal' ".

II. Statement . . . The United States Treatment of Facts Incomplete.

The Government has purported to set forth in detail an outline of the testimony in the record. The statement by the Government is, however, incomplete and, therefore, misleading.

A single example will suffice to demonstrate the misleading impression created by the omissions in the Government's Statement of Facts.

In its description of the Ashworth judgment the Government states that the facts show that Petitioner bought a $25,000 note for not in excess of $1,000, obtained a judgment for $37,795.60, which judgment he settled for $1,325, and on account of this transaction, subtracted a loss on his tax return of $36,470.60.

This statement is grossly incomplete. Actually, the $25,000 note originated when Ashworth gave it to a corporation controlled by the Petitioner. The Petitioner had given Ashworth stock worth $25,000 or more in consideration of Ashworth giving the corporation $25,000 in cash, services and the knowledge of certain British manufacturing

techniques. The note was purchased by Petitioner when the corporation became insolvent. (R. 323-328, 436-44).

Petitioner believes these additional facts had a considerably different light on the nature of Petitioner's treatment of this matter in his tax returns. Petitioner may actually have been entitled to claim all or part of the loss as a tax deduction in view of the fact that he could have claimed a similar loss at the time of transfer of the stock. (See *Peabody Coal Co.* v. *Commissioner,* 8 F. Supp. 845). In any case, on such a state of facts, it was obviously prejudicial not to instruct the jury on the applicable tax principles by which, alone, the jury could have guaged the petitioner's state of mind.

By the same token, refusal of the Court to instruct as to the various principles of tax law governing the other disputed items, illustrated in the Petition, gave rise to the same prejudicial error. After all, all the disputed items arose in connection with interrelated family businesses, and as the Court stated in *United States* v. *Cole, et al., supra*:

> Members of a family dealing with each other disregard the ordinary rules of business, and many things that may look suspicious in dealings between strangers, lose their ominous significance when we are dealing with a closely knit family corporation.

III. Argument . . . United States Fails to Answer Questions Presented by Petition.

Nowhere does the Government produce authority for any proposition that "knowledge" or "wilfulness" can be inferred from the mere filing of an incorrect return. In its argument the Government relies heavily on the cases of *United States* v. *Croessant,* 178 F. (2d) 96, certiorari denied 339 U. S. 927 and *United States* v. *Pannell,* 178 F. (2d) 98, certiorari dismissed on motion of counsel for Pannell, 339 U. S. 927. The government points out that this Court only recently refused to review the *Croessant* case, *supra.* It is astounding to find the Government apparently attempting

to rely on this denial of certiorari in view of the oft-repeated statements by this Court that from such denials nothing may be argued.

Petitioner submits that these cases offer no support for the Government contention when the decisions of the Third Circuit are examined carefully. The Third Circuit decided the question of what acts constitute a crime punishable as a felony by the terms of Section 145 (b) in the *Croessant* case, *supra.* In the *Croessant* case, the defendant, among other things, "charged up certain sums as expenses, which were not incurred" among other things. The Third Circuit stated in its opinion that the trial court found a wilful attempt and the defendant did not contend that such an attempt was contrary to the evidence or that the trial judge's instructions were improper. The defendant relied on the argument, in the words of the Court, that "if one subject to a tax is not guilty of a felony as described in Section 145 (b), by failing to file a return at all, *a fortiori* he cannot be guilty of a felony by filing a false return." The Third Circuit in disposing of this contention emphasized that the filing of a false return together with "*wilful commission*" of acts of evasion can constitute the felony.

It is interesting to note that in the *Croessant* case, *supra,* the Third Circuit quotes in support of its position the case of *Cave* v. *United States,* 159 F. (2d) 464 (C. A. 8) upon which case the Government also relies in its argument. The *Cave* case, *supra,* is quoted as follows:

> "The crime denounced by Section 145(b) . . . is complete when the taxpayer willfully and knowingly files a false and fradulent return with intent to defeat or evade any part of the tax due the United States."

The Petitioner must agree with this statement and with both the Third and Eighth Circuits if this is their interpretation of the law. But the statement very carefully refers to the requirements of "wilfulness" and "knowledge." And as the Petitioner indicates, the standards im-

posed by this Court in the *Spies* case, *supra,* were certainly the standards used in the *Cave* case, *supra.*

The Petitioner set forth the charge of the trial court in the *Cave* case on Page 13 of the Petition. Unfortunately, some courts and the Government have been insufficiently discerning of the actual charge given by the Court in the *Cave* case and have relied upon that case as the basis for an entirely fallacious interpretation of the *Spies* case and its enunciation of the types of affirmative conduct from which "knowledge" and "wilfulness" could be inferred in sufficient measure for the felony defined by Section 145(b). This error has been prepetuated even after clarification by the Eighth Circuit in the case of *Kirsch* v. *United States,* 174 F. (2d) 595. In its argument, it will be noted that the Government has erroneously cited the *Cave* case for a principle which the case does not support.

Respondent's argument also relies heavily on its distinction of the meaning of the opinion of the Fifth Circuit in *Jones* v. *United States,* 164 F. (2d) 398. Petitioner has not even cited this case in his petition and does not believe it profitable to pursue further discussion of it despite disagreement with the contention of the Respondent.

The Government failed to meet the contention of the Petitioner that the Court committed reversible error in failing to instruct as to the lesser offenses. Rather, the Government contented itself with an irrelevant proposition concerning degree of proof; "it may be assumed, for present purposes that the evidence in this case would have supported a conviction for the lesser offenses . . .".

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 397.

ALFRED C. GAUNT, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner and presents this petition for a rehearing on the petition for a writ of certiorari filed in this case praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered July 28, 1950, modifying and affirming as modified the judgment of the United States District Court for the District of Massachusetts and also the orders of the court entered September 19, 1950, denying petition for rehearing and motion to modify judgment.

JURISDICTIONAL STATEMENT

The petition for certiorari was filed on November 10, 1950, and denied on January 8, 1951. This petition for rehearing is filed within fifteen days from January 8, 1951, in accordance with Rule 33 of this Court, as amended October 13, 1947.

GROUNDS FOR PETITION FOR REHEARING.

In applying for this rehearing, your petitioner respectfully sets forth the following substantial grounds not previously presented.

1. It was error to instruct the jury that petitioner "made what were errors of law in his tax return", and in other instructions referring to errors of law, such instructions being inaccurate, incomplete and prejudicial. Accordingly, petitioner's conviction and its affirmance by the First Circuit were without due process of law.

2. It was error to fail to grant a mistrial or a motion for a new trial after the prejudicial question of the Government with regard to an alleged prior conviction of the petitioner, there having been no such conviction as a matter of fact. Accordingly, petitioner's conviction and its affirmance by the First Circuit were without due process of law.

ARGUMENT.

1. The District Court Erred in Instructing the Jury That Petitioner "Made What Were Errors of Law in His Tax Return", and in Other Instructions Referring to Errors of Law, Such Instructions Being Inaccurate, Incomplete and Prejudical.

The petition heretofore presented posed for the Court the prejudice resulting to the taxpayer when the District Court refused to instruct the jury as to applicable principles of tax law. The record reflects the fact and poses the

question not only of failure to instruct but of actual prejudicial misinstruction on this score.

The trial judge charged:

> "He may or he may not owe taxes, but that isn't your problem. You are here on a much more serious problem, of determining what was his state of mind when *he made what were errors of law in his tax return.*" (R. 684) (Italics added)

In thus instructing the trial judge removed from the jury all questions involved in determining tax evasion except the single question of intent. He determined as a matter of law that the taxpayer had not properly reported tax liability in connection with at least the transactions referred to in the charge and had accordingly understated his income.

The trial judge elsewhere in his charge referred in detail to several of the "errors of law" and offhandedly disposed of others unidentified by stating:

> "I have already said to you that I am going to select for comment only such errors as seem to me to involve a minimum of disagreement between the parties, and such errors as I think you can carry in mind." (R. 677)

The two preceding excerpts clearly prejudiced the taxpayer. The jury was permitted to believe that any and all allegations of tax errors made by the Government at any time during the trial were correct. This view seems to be corroborated by Exhibit "A" attached hereto in which the Boston Sunday Herald newspaper of October 1, 1950 reports a petition by seven members of the jury who convicted the taxpayer for a "new chance" for him, giving as one ground that the jurors had learned "that the courts have ruled that the payment of 'moral debts' similar to what occurred in this case has been declared deductible". *There is no reference at all in the trial judge's charge to errors of law involving the payment of moral debts.* Per-

haps the trial judge intended that the jury consider only what he deemed errors involving "a minimum of disagreement". If so, the instructions were not accordingly restrictive and the jury were permitted to consider all allegations of error by the government indiscriminately.

But even more prejudicial is that portion of the trial judge's charge concerning itself with the details of the "error of law" referred to throughout the record as the "Ashworth note".

The Court charged:

> "I pass from the double deductions to the problem of the Ashworth note, about which I intend to say much less than might be said as a matter of law, but I want to confine myself to a point as to which I hope there is no dispute. The defendant, Mr. Gaunt, acquired the Ashworth note, together with other assets apparently of negligible value, at a receiver's sale where the assets of the Merrimac Mills Inc. was sold, and for those assets he paid $1000. Subsequently, he collected, through a lawyer, that note. The lawyer made a charge for the collection, and the net proceeds which were received by Mr. Gaunt were in the neighborhood of $630 to $650—I haven't the figure exactly in my mind; it was between six and seven hundred dollars.
>
> Now, you will remember that this note was bought, together with other assets, for $1000, and it was charged off in 1945 as a loss of $36,470.60. Mr. Gaunt stated that his reasons for doing that were, that taking into account all the circumstances as to the issuance of the note and the issuance of securities to Mr. Ashworth, securities which had belonged to the defendant, there was in fact, in his view, a loss through the transaction viewed in its largest aspect, of $36,000 odd.
>
> Now, let me caution you. The fact that Mr. Gaunt was only entitled to a deduction of a few dollars, if anything, does not show by itself that he intended to defraud, or defeat or evade the tax. The question is, what was Mr. Gaunt's mental attitude. Errors of law which he made do not count against him in this proceeding at all by virtue of their being errors of law. He is to be held, if at all, only if he had a wicked intent

> and was knowingly cheating the Government. The surrounding circumstances of the transaction may be taken into account by you in determining whether he intended to defeat and evade a tax, and you are to give such weight as you see fit to his own testimony on the stand. If you believe he made these errors in good faith, then you are not under any circumstances to convict him under this statute. If all he did was make mistakes of law, then the Government is entitled merely to a civil remedy, to bring suit against him to collect back taxes. In this case, the Government is not entitled to prevail criminally unless the defendant acted with a bad motive, intending to defeat or evade the income tax." (R. 678-679)

It is submitted that the trial court was completely in error in its finding that the taxpayer's treatment of the Ashworth note was erroneous as a matter of law.

The record discloses that in 1929 petitioner found it necessary for the welfare of the corporation to surrender part of this stock in the corporation in which he was principal stockholder to Ashworth, who in turn agreed to contribute his experience and $25,000 to the corporation. These contributions were to enable the corporation to make necessary additions to its operations. As the record reflects (R. 437):

> "The Court: I understand your testimony is that you gave him the stock and he gave the company a note, the company gave him nothing, but the consideration, if anything, was from you personally?
>
> "The Witness: Correct."

Ashworth failed to contribute the $25,000 and instead delivered to the corporation a promissory note in the amount of $25,000.00. In return for his stock, petitioner did not receive any tangible or definite consideration of determinative value. In 1930, the Receiver for the corporation sold the "Ashworth note" together with certain other assets for $1,000.00 to the petitioner. At a later date, petitioner sued Ashworth on the note and recovered a judg-

ment for the face value and interest in the total amount of approximately $36,000. The judgment was finally compromised with Ashworth for $1,325 (R. 323-328, 436-440), and the petitioner treated the difference as a deductible loss.

The expanded facts concerning the Ashworth note indicate that the note was made as the result of a contract between the taxpayer and Ashworth for the benefit of the corporation in which the taxpayer was the principal stockholder. There is unrebutted authority for the proposition that the taxpayer had a taxable loss on this note in 1945 in at least an amount approximate to the deduction made. In *Peabody Coal Company* v. *United States*, 8 Fed. Supp. 845, it was decided that a stockholder who surrendered a part of his stock to a corporation may deduct as a loss the cost or market value of the stock when surrendered, the corporation having required the stock for the business purpose of reselling it to a third party in order to induce a refinancing agreement. The court pointed out that a loss was recognized because there was no definite or determinable consideration going to the stockholder under the stock surrender agreement. See also *Miller* v. *Commissioner*, 45 BTA 292.

The taxpayer surrendered his stock directly to Ashworth. Ashworth was to provide certain services and a payment of $25,000. The record does not show the cost or market value of the stock. It might well be inferred that it had a value considerably in excess of $25,000. It is a well-founded proposition in tax law that a business loss should be claimed in the taxable year in which it can be established. I. R. C. Reg. Sec. 29.23(e)-1; See *Becker* v. *Anheuser-Busch, Inc.*, 120 F. (2d) 403. Since Ashworth had not paid the corporation the promised monetary consideration, the taxpayer did not claim an immediate loss as in the *Peabody* case, supra, but acquired the Ashworth note and devoted considerable effort to trying to enforce the note so as to prevent a loss. It was only after there was no longer any forseeable possibility of making himself whole that the

taxpayer determined that he must acknowledge a loss and accordingly claimed it tax-wise. It is therefore submitted that the substantial loss which was never claimed by the taxpayer until 1945 was actually incurred and was deductible in 1945.

2. It Was Error to Fail to Grant a Mistrial or a Motion for a New Trial After the Prejudicial Question of the Government With Regard to an Alleged Prior Conviction of the Petitioner, There Having Been No Such Conviction as a Matter of Fact.

The trial court's failure to declare a mistrial or to grant a new trial because of the prejudicial question regarding an alleged prior conviction is a violation of petitioner's constitutional rights. The Government cross-examined a character witness and asked whether the witness had heard "that the defendant was convicted for violation of the labor laws in—" (R. 637). An objection by counsel was sustained and the jury instructed to disregard it. Counsel for petitioner, after the court has sustained the objection, said, "Your Honor, I think it is highly prejudicial", clearly in preparation for a motion for a mistrial. The court called counsel to the bench, stated that the question was "not sufficiently prejudicial to warrant a new trial", and thus in effect denied the motion for mistrial as well as the motion for a new trial (R. 19), on authority of *Michelson* v. *United States*, 335 U. S. 469, cited by the Government as the basis for the question. The United States Court of Appeals for the First Circuit upheld the Trial Court on the authority of the same case.

The *Michelson* case, supra, however, as Chief Judge Magruder pointed out in his concurring opinion below, holds that this type of question may be permissible in the discretion of the trial judge, *provided the proper factual basis therefor exists.* (Italics added.) After the trial it became apparent that such factual basis did not exist, in that the *corporation* in which petitioner had an interest,

had been charged and convicted of certain technical labor law violations, but *not* petitioner, and the court so found after the trial (R. 688). But, for reasons unknown, the First Circuit in its opinion took no cognizance of the above facts and therefore erroneously ruled that the facts in the instant case were identical with those in the *Michelson* case, supra. (R. 907)

Obviously, the government's question was deliberate and premeditated and was framed with the Michelson case in mind. But it was framed in a careless and reckless manner and it was not based on facts. The government did not ask: "Did you hear that defendant was charged with . . .", or "was arrested for . . . violation of the labor laws", but asked *"Did you hear that he was convicted"*. (Italics added.) This court discussed the propriety of both questions in the *Michelson* case, supra, since the questions regarding both prior arrest and prior conviction were in issue on that cause. But there was never any doubt that the question regarding prior arrest was based upon an actual prior arrest and the question regarding a prior conviction was based on an actual prior conviction. From the language of this Court's opinion it must be strongly inferred that the Michelson decision set the very outside limits of propriety of questions of this nature and that the burden was on the Government to frame the question with extreme care and not to substitute the word "convicted" for the word "charged with". The burden was also on the trial judge to ascertain whether the question was based on fact. As this court said in the *Michelson* case, supra:

> "Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse". (At p. 480)

This court was satisfied that the trial judge in the *Michelson* case was "scrupulous to guard" the practice against misuse. "He took pains to ascertain out of the presence of the jury, that the target of the question was an actual event, which would probably result in some comment among

acquaintances, if not injury to defendant's reputation. He satisfied himself that counsel was not taking a random shot at a reputation imprudently exposed *or asking a groundless question to waft an unwarranted innuendo into the jury box"*. (ibid. at p. 481) (Italics added)

In the instant case the trial judge did not take any such precautions. He did not guard against misuse of the practice nor did he take pains to ascertain whether the question was based on fact. On the contrary, when the Government offered a "statement for the record" in this connection, the Court refused it, saying that "it doesn't make any difference".

It is submitted that the trial court flagrantly abused its discretion in curtly denying the motion for mistrial almost before it was made, that he failed in his "heavy responsibility" by not ascertaining the factual basis for the question and by not granting a new trial after he had found that there was no factual basis for it.

That unique significance to be attached to the District Attorney's question, particularly inasmuch as it involved labor practice, was apparently understood by the trial judge who took the unusual step of making the following statement in his charge:

> "I am very sorry that there was an issue of politics raised in this case. No man in this court room, I am sure, is interested in considering political questions with respect to this case. You are not here as Republicans or Democrats or Socialists, and I have no reason to believe that anyone else is here in a partisan capacity. A man is here to be judged on the basis of his tax record, not his political record. And I have no reason to suppose that the Grand Jury differed one bit from you gentlemen in acting according to their consciences and their views of justice. A man who is or has been a member of the Governor's Council is entitled to just as good a break as a man who has not been, and he is not entitled to one bit better break." (P. 684)

Accordingly, it is submitted that in this case the instruction to disregard was insufficient because the error was so serious that it likely affected the minds of the jury. See *Volkmer* v. *U. S.*, 13 F. 2nd 594.

Little need be said on the point that the instruction to disregard the reference could not cure the error made. On the contrary, by his words "it is an improper reference", the trial court in fact turned an "unwarranted innuendo" into an established fact improperly referred to. He vouched for the truth of the alleged conviction by saying it should not have been referred to and should be disregarded. Exhibit A shows as a fact that which has long been found by experienced trial judges,* namely, that a mere instruction to disregard a certain question is of no effect on the jury, that the harm done cannot be undone. The jurors heard it and apparently believed it and it apparently influenced their verdict to an extent that they addressed themselves to the appellate court asking for a new trial when they found that what they believed true was not true.

It is submitted therefore that this trial court's abuse of its discretion and failure to follow the law of the Michelson case as laid down by this court, deprived the petitioner of his constitutional right to due process and a fair trial.

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* In *U. S.* v. *Preston Tucker, et al.* (D. C. N. D. Ill. October, 1949), Labuy, J. granted without opinion a mistrial in a similar situation, because "merely instructing the jury to disregard the testimony would be insufficient".

CONCLUSION.

For the foregoing reasons, the petitioner respectfully urges that a rehearing be granted; that upon further consideration the order of January 8, 1951 denying the petition for certiorari be revoked, and that the writ of certiorari issue.

Respectfully submitted,

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BERT B. RAND,
Attorneys for Petitioner.

Of Counsel:
HANS A. NATHAN.

I, Bert B. Rand, attorney for the petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay and is restricted to substantial grounds available to petitioner although not previously presented.

BERT B. RAND,
Attorney for Petitioner.

EXHIBIT "A".

Jurors Ask New Chance for Gaunt.

Seven members of the jury that convicted Alfred E. Gaunt of Methuen, ex-member of the Governor's Council on federal tax evasion charges last October, yesterday appealed to the courts to give him another chance.

The jurors, in a petition to the U. S. Circuit Court of Appeals, urged that Gaunt be given a rehearing or a new trial, or that the court abate his sentence of 18 months in a federal penitentiary and a fine of $6000.

Jurors Surprised.

The action of the jurors was taken on the initiative of one of their number, James T. Gurney, painter, of Braintree, who called a meeting of the group at a Boston restaurant Sept. 9. Gurney said that the jurors acted because they "were surprised at the sentence imposed on Gaunt."

The 68-year-old former councillor and onetime head of the Merrimac Mills Company, was found guilty at his trial before Judge Charles E. Wyzanski and the jury of evading $83,223 in income taxes in 1945 and 1946. He was found not guilty on another count charging evasion of $18,000 in 1944.

In their petition the seven jurors said:

"The undersigned members of the jury in the case of Alfred E. Gaunt respectfully ask your consideration of this petition for a rehearing or a change of sentence.

"The jury voted not guilty for 1944 and guilty for 1945 and 1946. Also it found him guilty on another count which we learn has now been reversed. At the trial Mr. Gaunt said he was willing to pay whatever he rightfully owed.

New Court Ruling.

"We also learn that the courts have ruled that the payment of 'moral debts' similar to what occurred in this case has been declared deductible, and that a criminal record on labor charges, such as was mentioned at the trial, actually does not exist.

"In view of all the circumstances we hope he will be granted one of the above pleas."

Signing this document, in addition to Gurney, were Paul C. McShane of Dorchester; Joseph M. O'Brien of Gardner; William J. Bresnahan, Henry J. Kovistra, Norman E. Peltier and Frank J. Regan.

The references in the petition to labor charges goes back, members of the jury said, to an implication by a government lawyer at the trial that Gaunt had been found guilty of a criminal violation of labor laws. Post-trial investigation, they said, revealed he had never been criminally convicted on any charge.

A majority of the jurors, Gurney said yesterday, have admitted that they found the case so complicated and bewildering that it was impossible for them to grasp all the evidence "with full understanding and without confusion." Their uncertainty, he said, was reflected by the fact that they found Gaunt guilty for the years 1945 and 1946 and not guilty for 1944 on essentially the same material.

Gaunt, a Republican, was elected to the Governor's Council in 1946 against the violent opposition of James Moriarty, then state commissioner of labor, and a former Methuen resident. He took office Jan. 1, 1947 and opposed the reappointment of Moriarty. That official was not reappointed by Gov. Bradford.

In an interview later, Gaunt said that a few weeks after these incidents the Internal Revenue Bureau suddenly began a re-examination of his income tax returns. He was a candidate for re-election in 1948, but went down in the Democratic landslide.

At his trial Gaunt, who said the charges against him were a "tragedy of errors" was defended by former Gov. Bradford.

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